

No. 11,693

IN THE
United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
G. W. HUME COMPANY,
Respondent.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELP-
ERS OF AMERICA, A.F.L., and CALIFORNIA
STATE COUNCIL OF CANNERY UNIONS,
A.F.L.,
Plaintiffs in Intervention,
vs.
NATIONAL LABOR RELATIONS BOARD,
Defendants in Intervention.

BRIEF FOR INTERVENORS.

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Defendants in Intervention.

BRIEF FOR INTERVENORS.

I. STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked by petitioner, as we understand its position, under Section 10 (e) of the National Labor Relations Act (49 Stat. 449, 29 U.S.C. 160 (e)) hereinafter called the "Act". The Act was

amended by the Labor Management Relations Act of 1947. (Pub. L. No. 101, 80th Cong., 1st Sess., June 23, 1947, 29 U.S.C.A. Sec. 141 et seq. (1947 Sup.).)

II. STATEMENT OF THE CASE.

A. Facts relating to the existence of a closed-shop contract and the dispute as to the interpretation of the contract.

The history of this case begins in June, 1941, when the California Processors & Growers (C. P. & G.), on behalf of its members, and the California State Council of Cannery Unions, a representative body of A. F. L. Cannery Unions, negotiated a collective bargaining agreement, referred to as the "Master Agreement" or the "Green Book Agreement". (R. 196-203; 277-278.)

The Master Agreement so concluded was to become operative in the individual plants of the members of the C. P. & G. upon execution of a certificate of acceptance by the individual plant owner and the Local Union having jurisdiction over the employees of the plant. (Sec. 2 of Master Agreement.)¹

The Master Agreement so concluded, as will be shown later (*infra* pp. 9-21), was a closed-shop contract within the proviso to Section 8 (3) of the Act.

In July, 1941, the respondent and Local 22382, the Local Union having jurisdiction over the respondent's plant, executed a certificate of acceptance of the terms and conditions of the Master Agreement. (R. 507-509.)

¹The pertinent portions of the Master Agreement are set forth on pp. 27-55 of the Board's Brief in the *Scientific Nutrition* case.

Thereafter, and until November, 1945, the Local Union and the respondent administered their agreement as a closed-shop contract. Both old and new employees failing to maintain their membership were precluded from continued employment. The testimony of Assistant Superintendent Gallardo is explicit and uncontradicted on this point:

“Q. Were there occasions during the years from 1940 to 1944, inclusive, when a representative of this Local 22382 would come to you and request that certain employees be discharged?

A. Yes.

Q. Was there just one or two of those occasions, or were there numerous occasions when that occurred?

A. Well, there were numerous occasions.

Q. During that entire period of time, was there any time when you did not comply with that request and go ahead and discharge the employee in question?

A. No. I would inform the employee that they had to clear with the union, or they could not work there, and most of the time they just would not show up any more. I would just tell them they could not work there. I never came right out and definitely told anybody, ‘You are fired’. I would just inform them of the fact that they would have to have a clearance with the union, or they could not work in the cannery, and they usually did not work, or else they got a clearance.

Q. These persons whom you discharged on request of the A. F. L., were these new employees, or were they old employees?

A. Most of them were old employees, but I believe there were a few new ones in there. In fact,

some of them I did not even know their names.'" (R. 472-474.)

During this period, respondent's president, also, interpreted the agreement as requiring closed-shop conditions. (R. 465.)

Prior to the affiliation of Local 22382 with the Teamsters the record fails to indicate the continued employment of any employee failing to maintain good standing in the Union. Indeed, by a supplementary agreement between respondent and Local 22382 on August 21, 1944, an automatic check-off of dues to the union was instituted at the plant. (R. 216-217.)

So far as it relates to the dominant issue in the present proceedings, therefore, the history of the case until mid-1945 contains nothing more than the execution of a traditional closed-shop contract and the subsequent administration of the contract so executed as a closed-shop contract.

Between June-November, 1945, a number of the employees, dissatisfied with the accession of the Teamsters as the governing body of the Local, revoked their authorizations for dues check-off and failed to maintain their status in the union. (R. 229-231.) Indeed, some of them joined a rival union, affiliated with the C. I. O. (R. 245, 259.)

In November, 1945, the A. F. L. demanded that strict enforcement of closed-shop conditions be maintained, and that those not clearing with the union be denied work. (R. 433-434.)

The respondent refused to do so after a conference with the C. P. & G. wherein the C. P. & G. "advised" the respondent that the C. P. & G. interpretation of the contract did not require discharge of employees failing to maintain membership in the union. (R. 464, 465.)

The A. F. L. then, on November 19 and 20, 1945, established a picket line and halted all truck deliveries to respondent's plant, demanding that twenty-eight employees, who had been suspended from the A. F. L. for non-payment of dues, be discharged. (R. 435, 436, 478.) The respondent acquiesced on November 20, 1945, and discharged the named employees (R. 480-482, 247-254, 380-381), and the A. F. L. lifted the picket line. (R. 482-483.) On the following morning a complete check of the union's status of employees was held. Those who failed to exhibit evidence of membership in good standing in the A. F. L. were prevented from entering the plant or were excluded from the plant. (R. 384-386, 391-392.)

Closed-shop conditions then continued in the plant until early February, 1946. In February, 1946, the respondent rehired a number of the employees discharged in November for refusal to maintain good-standing in the union. The A. F. L. immediately called upon the Central Adjustment Board, a body established pursuant to the Master Agreement, composed of an equal number of C. P. & G. and A. F. L. representatives, to adjust this violation of the closed-shop contract. (R. 448-451.)

The Central Adjustment Board, by secret vote, divided evenly on the question whether the contract required discharge of employees failing to maintain their status in

the Union. (R. 448-451.) The matter was then referred to arbitration by an individual to be named by the U. S. Conciliation Service. (R. 445-446, 448-451.) The arbitrator so named, however, refused to serve. (R. 452-454.) Shortly thereafter the hearings in the present proceeding commenced and no further effort was made to arbitrate the question.

B. Respondent's assistance to the A. F. L. in 1945-1946.

As previously stated, the crucial question in the present proceedings is whether the agreement between respondent and intervenors constituted a closed-shop contract. On the assumption that it did not, the Board has characterized certain acts of the respondent as "unlawful assistance". These acts included:

(1) Permitting a speech in August, 1945, by a field representative of the C. P. & G. who urged the assembled employees of respondent to "clear through the Teamsters". (R. 233-234, 468-469.) (Petitioner's brief p. 8.)

(2) The refusal of respondent to hire "seasonal" employees on the seniority list who had not cleared with the A.F.L. (R. 326-328, 346-348.) (Petitioner's brief p. 9.)

(3) The discharge in November, 1945, of twenty-eight employees who had failed to maintain their membership in the A. F. L. (R. 380-381, 389-390, 491-492, 500-501.) (Petitioner's brief p. 10-15.)

(4) The discharge of one employee in December, 1945, who had failed to maintain his membership in the union. (R. 371-375.) (Petitioner's brief p. 15.)

It is obvious, of course, that if the A. F. L. Local did have a closed-shop contract, as intervenors contend, the above "acts of assistance", far from being unlawful, were contractual obligations of the respondent.

C. The clarification of the closed-shop provision during the pendency of representation proceedings.

In October, 1945, the Board directed an election among the employees of respondent's and other packing concerns. (R. 570.) The election was held in mid-October (R. 243-244), but was set aside in February, 1946, because of procedural irregularities vitiating its accuracy. (R. 595-614.)

In March, 1946, the respondent and the A. F. L. executed a memorandum agreement delineating a closed-shop in respondent's plant in express and unequivocal language (R. 219-220) and thus set to rest any possible doubt as to the closed-shop nature of its obligation. The Board has deemed the execution of this agreement a violation of Section 8 (1) in view of the pendency of representation proceedings at the date of execution. This aspect of the case, as discussed *infra* p. 9, will be governed by the decision of this Honorable Court in *N.L.R.B. v. Flotill Products, Inc.*, No. 11,449. It should be pointed out, however, that if intervenors' basic contention is upheld and the Master Agreement is denominated a closed-shop, the execution of this agreement did not add to or detract from the contractual obligations of the respondent as set forth in the Master Agreement.

SUMMARY OF ARGUMENT.

In its brief, the Board has confined the issues in the present proceeding to the questions:

1. Whether the discharges were in pursuance of a valid closed-shop contract and thereby protected under the proviso to Section 8 (3) of the Act;

2. Whether the Board properly concluded that the respondent violated Section 8 (1) of the Act:

a. By rendering assistance to the A. F. L.,

b. By entering into a closed-shop contract with the A. F. L. when a representation question affecting its employees was pending before the Board. (Petitioner's brief, page 22.)

So confined, the Board's first contention requires a determination whether the so-called Master Agreement constituted by express or implied terms, a closed-shop contract. This phase of the case largely involves a reiteration of the argument of intervenors set forth in *National Labor Relations Board v. Scientific Nutrition Corporation*, No. 11,694 in the United States Circuit Court of Appeals for the Ninth Circuit.²

The second issue raised by the Board is subdivided into two components:

1. Having concluded that the intervenors did not have a closed-shop contract with the respondent, the Board found, in accordance with its usual practice, a violation of Section 8 (1) of the Act. Consequently, the validity of

²The Brief in the *Scientific Nutrition* case is on file with the Clerk of the Court and intervenors have served the parties with copies thereof.

the finding of a violation of Section 8 (1) of the Act rests upon the validity of the Board's contention that the Master Agreement did not constitute a closed-shop contract.

2. The Board has further found a violation of Section 8 (1) in view of the fact that the respondent entered into a closed-shop contract with the A. F. L. when a representation question affecting its employees was pending before the Board. The Board has taken the position: "The legal considerations involved in this phase of the case are, as the Board noted (R. 35), identical with those involved in the matter of Flotill Products, Inc., 70 N.L.R.B. 119." (Petitioner's brief, p. 34.) Intervenors, likewise, agree that the decision in the matter of Flotill Products, Inc., is determinative of this latter aspect of the present proceedings.

ARGUMENT.

A. THE BOARD'S FINDING THAT RESPONDENT AND THE INTERVENORS DID NOT HAVE A CLOSED-SHOP CONTRACT IS UNTENABLE.

1. The inclusion in the collective bargaining agreement of the provision permitting union members to lay down their tools if non-union members are employed is decisive evidence that the collective bargaining agreement between respondent and intervenors constituted a closed-shop contract.

In the instant case, the parties to the agreement utilized an ancient provision to denominate the existence of a closed-shop and, indicative of the overriding importance attached to this issue of union security, placed the provision as prefatory to all other union security provisions in the contract. Section III of the Agreement provides:

*“It is recognized that the refusal of Union members to work with non-Union employees who are within the jurisdiction of the Local Union shall not constitute a violation of this agreement. * * *”* (Appendix B, Petitioner’s Brief, p. 31.)³

The inclusion of this provision is, we submit, decisive of the question whether the parties to the agreement executed a closed-shop agreement: *This provision is the strongest concession that an employer can grant to assure the Union of maintenance of closed-shop conditions.*

The provision authorizes work stoppages for the enforcement of a closed-shop provision, and has been so recognized by commentators.⁴ Indeed, it permits enforcement of the clause by the method of work stoppage which is even more drastic than a strike.⁵

³All italics in this brief are our own.

⁴“In a few industries where bargaining is generally conducted with employers’ associations, the strike has been accepted as a means of enforcing the agreement against recalcitrant members of the association. In such cases *strikes against individual employers are permitted for enforcement purposes* and do not constitute a violation of the association agreement.” (Italics supplied.) “Union Agreement Provisions”, *Bulletin No. 686*, U. S. Department of Labor, Bureau of Labor Statistics, U. S. Government Printing Office (1942), p. 162. By permitting a refusal to work if non-Union employees are employed, the Association was obviously assenting to the enforcement of the agreement as a closed shop.

⁵The distinction between a refusal to work and a strike is demonstrated by the following language from *New York Labor Relations Board v. Union Club of City of New York*, 268 App. Div. 516, 52 N. Y. Supp. (2d) 74 (1944).

“What occurred here did not amount to a strike in the ordinary sense of the term. The employees did not leave the premises of the employer, but remained thereon. They did not choose to abandon their work until their demands were met.”

This case was reversed on other grounds in *New York State Labor Relations Board v. Union Club of City of New York*, 295 N. Y. 917, 68 N. E. (2d) 29 (1946).

It is undenied that Intervenors consistently maintained the position that work stoppages were sanctioned by the Agreement. Quoting from the testimony of R. M. Tomson, Secretary-Treasurer and Business Manager of Local 22382 from July 1942 to June 1945, President of the California State Council of Cannery Unions from February 1944 to June 1945, and member of the Adjustment Board provided for in the Master Agreement:

“Q. In connection with employees newly hired, is it not a fact, Mr. Tomson, that you on occasions visited the plant of members of the C. P. & G. and told the employers to discharge workers who have failed to complete their affiliation with the Union?

A. Well, we might have asked them to. *We might have even threatened them with causing a work stoppage if they did not.*

Q. And you felt that that was a matter of your right under the union contract, did you not?

A. It was a matter of right under the contract for the Union members to refuse to work with non-Union members.” (R. 320.)

Embodied only in the contracts of Unions having a long history of the strictest closed-shop conditions, the refusal proviso affords a *modus operandi* which would place an employer in the disastrous position of subjection to economic ruin if non-Union members are employed or retained. Clearly in the absence of such a closed-shop enforcement provision, the employees would not have this right to lay down their tools.⁶ Nor can it be successfully

⁶Thus, in arbitration proceedings involving the United Automobile Workers and the Allis Chalmers Manufacturing Company arising out of the refusal of an employee to work alongside a prompter of a rival union and deserter from the CIO, arbitrator Lloyd

maintained that an employer would *authorize* this cessation of operations during working hours and consequent increase in operating costs if he contemplated hiring or retaining a non-Union employee. Substantively, the Board is arguing that the employer, in effect contemplated the retention or hiring of non-Union employees and concurrently authorized the Union employees—his entire working force—to lay down their tools if he did. The absurdity of ascribing such a schizophrenic intention to the bargaining parties is manifest.

Yet this absurdity is compounded and rendered more grotesque when the bargaining agreement is construed in conjunction with the provisions of the National Labor Relations Act and decisions thereunder.⁷ Having authorized the employees to lay down their tools if non-Union employees are employed, the employer would be powerless to terminate the stoppage by discharging the non-Union employee since such a discharge, according to the Board, would constitute an unfair labor practice under the doctrine of the *Star Publishing Company* case.⁸ Nor, could the employer discharge the idle employees and terminate the employer-employee relationship: The employees laid

Garrison after finding the bargaining agreement did not provide for a closed-shop, established the principle:

“A member of a labor organization (*in absence of closed-shop*) has no right to refuse to work with another man because the other man is a member of another labor organization.”

Awards by Special Arbitrators, Rules on Union-Company Relations, 9 Labor Relations Reference Manual 833 (1941).

⁷It goes without saying that “the contracting parties are presumed to have had in view the statute upon the subject, and it must be held to enter into and become a part of their contract upon that subject, if the contract can be so construed”. *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995 (1894).

⁸*N.L.R.B. v. Star Publishing Co.*, 97 F. (2d) 465 (CCA 9), enforcing 4 N.L.R.B. 498.

down their tools at his express and written authorization! Yet, according to the Board, the parties intended nothing less than this absurdity.

It is hornbook law that a contract is not to be construed to yield an unusual and extraordinary result. It is equally axiomatic that a contract will be presumed to have been drawn for the attainment of lawful objectives. The Board, by cavalierly dismissing this vital provision, has ascribed to the bargaining parties the desire to subject the respondent's plant to the hazard of economic destruction eventuating upon the whim of a single employee who fails to retain his union membership, for the Board denies the employer contemplated any lawful means of terminating the consequent work stoppage.

That the provision in question is a more stringent union security clause than the usual closed-shop provision can be demonstrated by a moment's analysis of its operative effect. In the event of a breach by the employer of a standard, explicit, yet bare, promise to maintain a closed-shop, the employees could:

- (a) Waive the breach.
- (b) Take legal action to enforce the agreement or obtain compensation for the breach.
- (c) Strike to compel enforcement.

Under the present provision, the employees have the above alternatives and also the privilege of conducting a work stoppage until the non-Union employee is dismissed. Insofar as a body of judicial decision exists to the effect that a work stoppage, as distinguished from a strike, to compel performance of a collective bargaining

agreement is unlawful,⁹ the inclusion in a collective bargaining agreement of employer authorization for such action is, indeed, far more advantageous to the Union than a less enforceable albeit more explicit promise that no non-Union employee will be retained.

2. **The mechanics set forth in the agreement to implement the provision enabling the union members to lay down their tools if non-union members are employed are consonant only with the existence of a closed-shop agreement.**

That the parties contemplated that this provision should operate as a closed-shop provision is clearly indicated by the mechanics set forth in the agreement by which the provision was to be enforced. Quoting further from Section III (a):

“(a) It is recognized that the refusal of union members to work with non-union employees who are within the jurisdiction of the local union shall not constitute a violation of this agreement, *provided*, however, that *before any strike action, job action, or other direct action* is taken on this account, the local union will submit the matter for adjustment as provided in Section 8 hereof. *In order to aid in the prompt adjustment of such matters, the union shall furnish its members with a clearance card, dues book or other evidence of paid-up membership, and when employees who are on the seniority lists, as defined in Section 9 hereof, are called to work, the employer will request that such evidence be presented by those who have it, and will keep a record, which will be available to the Union, of all employees who do not*

⁹See: *New York Labor Relations Board v. Union Club of City of New York*, 268 App. Div. 516, 52 N. Y. Supp. (2d) 74 (1944); *C. G. Conn, Ltd. v. National Labor Relations Board*, 108 Fed. (2d) 390 (CCA 7) (1939).

present such evidence. Similarly, the union will from time to time, when such information is available, notify the employer of the names of delinquent or suspended members, or other non-union employees, according to union records." (Italics supplied.)

Paraphrasing the Board's essential contention that the above provision is consistent with the creation of an open shop, we find the employer not only *authorizing* economic action against his plant but also actively *assisting* in discovering grounds for commencing it! The employer must "keep a record" of employees who fail to join the union, and he must make that record "available to the union". When the record shows non-membership of a single employee, all employees are entitled to stop working. Can it be seriously contended that an employer would not only *authorize* a work stoppage but bind himself to the duty of scurrying about to give the union grounds for its commencement if his contract with the union were intended to prevent the discharge of the offending employee, the source of the difficulty?

These provisions for checking and cross-checking for "evidence of paid-up membership", implementing the right to lay down tools if non-union employees are retained, comprise nothing less than an implicit recognition of the requirement that such union card be obtained and maintained by the employee. Obviously, unless the parties to the agreement contemplated the discharge of any non-union employee, the mere determination of non-union status would not "aid in the prompt adjustment" of a threatened exercise of the contractual privilege to cease work. The only possible method of "adjustment" and

avoidance of strife is the discharge of the non-union employee.

3. **The inclusion of a preferential hiring clause and the institution of a voluntary check-off are additional strong indicia that the parties executed a closed-shop agreement.**

Paragraph two of Section 3 (a) of the Agreement between the respondent and the intervenors provides:

“The Employer shall be the sole judge of the qualifications of all of its employees, subject to appeal as provided in Section 8 hereof, but in the selection of new employees the Employer will give preference of employment to unemployed members of the local union, provided they have the necessary qualifications and are available when new employees are to be hired. ‘New Employees’, for the purpose of this agreement, are defined to be persons who are not on the seniority list of the hiring plant, as defined in Section 9 hereof, even though they may have been employed previously by said plant. As a basis for preferential consideration as new employees as aforesaid, unemployed members of the local union shall be required to present a clearance card from the local union evidencing the fact of their paid-up membership. (If such union members are not available for such employment, the Employer may hire any person not a member of the Union provided that such person will be required to file an application for membership in the local union before being put to work. Upon filing such application he shall receive from the Union a written statement that he has made such application, which statement shall be taken up by the Employer and returned to the Union when the applicant is put to work. It is further understood that such person must become a member of the local union

within ten (10) days after his employment, and that the local union will not unreasonably refuse to accept such person as a member.)”

These provisions requiring union membership of all new employees and also providing for preferential hiring through the Union are the usual ancillary provisions of closed-shop agreements. As stated by the Department of Labor:

“Provisions establishing some form of closed or preferential union shop are frequently accompanied by provisions outlining the procedure to be followed in hiring new employees * * *

“A time limit may be applied to the provision for hiring through the union office. Thus, if sufficient persons cannot be furnished by the union within a specified number of hours, the employer is allowed to secure workers from other sources. * * * *If a closed shop exists, workers hired in the open market must specify their willingness to join the union, and are usually given a few days after employment within which to apply for membership.*”¹⁰

Similarly, although provision for a check-off was not incorporated in the agreement, the voluntary institution and maintenance of a check-off system for a considerable period of time is additional persuasive evidence that the parties believed they were administering a closed-shop agreement. As stated by the Department of Labor:

“The check-off provision has no inherent connection with the type of recognition in existence. *As a rule, however, unions which are well enough estab-*

¹⁰“Union Security Provisions”, supra, footnote 4, p. 27.

*lished to obtain a check-off system are likely also to have a closed or union shop.'*¹¹

The inclusion of provisions that are common ancillaries to closed-shop agreements and the institution of a voluntary check-off are, counsel submit, strong and persuasive evidence that the parties contemplated, executed and administered an agreement providing for a closed-shop and rendered membership in the union a condition of continued employment.

4. The Board has not followed its doctrine of strict construction in previous proceedings.

Woven into the fabric of the Board's argument is a thread of innuendo to the effect that the closed-shop provision in a collective bargaining agreement must be written in express, unequivocal and standard language. It must be initially recognized, however, that in the instant agreement the phrase in question permitting union members to lay down their tools was incorporated in the agreement at a time when the language of collective bargaining agreements was still in a formative stage.¹² Furthermore,

¹¹Ibid., p. 29.

¹²"Union Agreement Provisions", supra, footnote 4, the first sizeable collection of union security clauses, was issued in 1942. The Bureau of National Affairs did not commence its "Collective Bargaining and Negotiations" service until 1945. Early cases before the Board indicate that parties frequently believed they were writing a closed-shop agreement although the language they employed only provided for preferential shop. See: *Matter of Ansley Radio Corporation and Local 1221, Electrical and Radio Workers of America*, 18 N.L.R. B. 1028 (1939); *Matter of General Furniture Manufacturing Co. and Furniture Workers' Union Local 1007*, 26 N.L.R.B. 74 (1940), discussed infra pp. 19-21. The instant union security provisions were first incorporated in the agreement in 1941.

the Supreme Court has tacitly recognized the validity of *oral* agreements for a closed shop¹³ and, indeed, the Board has construed as “closed-shop agreements” written collective bargaining contracts *providing only for preferential hiring* when the parties, in good faith, regarded the agreement as containing a closed-shop provision.

Thus in *Ansley Radio Corporation and Local 1221 United Electrical and Radio Workers of America*, 18 N.L.R.B. 1028 (1939), the Board, refusing to declare a preferential hiring agreement as insufficient to constitute a closed-shop agreement in view of the parties’ declared construction of their contract, stated:

“Effectuation of the purposes and policy of the Act requires that in such instances the determination of whether the respondent has engaged in an unfair labor practice should not depend upon a fact which is contrary to the understanding of the employer and all persons concerned * * *” (18 N.L.R.B. at 1031.)

Again, in *Matter of General Furniture Manufacturing Company and Furniture Workers’ Union Local 1007*, 26 N.L.R.B. 74 (1940), the written agreement provided:

“In filling vacancies or hiring new help, the Company agrees to give preference to members of the Union. If Union men who are satisfactory to the Company are not available, the Company may then hire whom they desire providing such employees join

¹³See: *National Labor Relations Board v. Electric Vacuum Cleaner Co.*, 315 U.S. 685, 62 S.Ct. 846 (1942), wherein the Court discussed at length whether the parties had “abandoned” an oral closed shop contract. The Board has explicitly held that an oral agreement is sufficient to satisfy the proviso to 8 (3) of the Act. *United Fruit Co. and International Longshoremen and Warehousemen’s Union*, 12 N. L. R. B. 404 (1939); *Taylor Milling Co. and Avery Smith and James L. Wykes*, 26 N.L.R.B. 424 (1940).

the Union within thirty (30) days of being given employment.” (26 N.L.R.B. at p. 79.)

Quoting from the findings of the Board in the mentioned case:

“The respondent and Local 2097 contend that by Article V of the contract the respondent was obligated to require union membership of all its employees, those in its employ at the time the contract was entered into as well as those hired thereafter. *The provision, on its face, however, appears to refer to only preferential hiring of new or additional employees through the Union and does not appear to establish a closed shop as the respondent and Local 2097 contend.* However, clear and convincing proof was adduced at the second hearing that the parties *mutually intended and agreed* in the agreement reached by them * * * and which they supposed was expressed in the instrument when executed that the respondent require of all production workers then in its employ and thereafter union membership as a condition of employment * * *” (26 N.L.R.B. at p. 79.)

The Board concluded, on page 80:

“Under these circumstances the contract will be considered for the purposes of this proceeding as a closed-shop contract, as if it expressly set forth the respondent’s undertaking.”

If the Board is willing to regard an unequivocal written preferential hiring agreement as constituting a closed shop, intervenors are at a loss to understand the Board’s sudden position that an agreement providing for preferential hiring, supplemented by provisions for inquiring

into and determining the union status of all employees *and* containing the traditional closed-shop provision permitting union employees to refuse to work if non-union employees are employed—an agreement regarded by the parties as a closed shop agreement—is insufficient to satisfy the proviso to Section 8(3) of the Act.

**B. THE OTHER CONTENTIONS OF THE BOARD ARE
WITHOUT MERIT.**

The Board has relied upon a series of cases commencing with *N.L.R.B. v. Cheney California Lumber Co.*, 327 U. S. 385 (1945) as precluding this Honorable Court from inquiry into the validity of the order of reinstatement of the Board and the propriety of all portions of its order to which the respondents and the Teamsters failed to make specific exception.

The fallacy in the argument is manifest. Section 10 (e) of the Act provides, *inter alia*:

“No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to *questions of fact* if supported by substantial evidence on the record considered as a whole shall be conclusive.” (Italics added.)

The finality of the Board’s rulings and order must be bottomed on *findings of fact*. The issue in the present case is not an issue of fact but an issue of law—the construction of a contract. As stated in *Aluminum Co. of America*

v. N.L.R.B. (CCA-7) 159 Fed. (2d) 523 (1946), wherein the Board had construed a closed-shop contract as inoperative and then sought enforcement of a reinstatement order:

“It is an elementary rule not requiring citation of authorities that the construction and meaning of a written contract is a question of law. * * * The problem in the instant case does not center about the drawing of inferences from surrounding circumstances, but instead it requires an interpretation of the language of the addendum itself * * *”

After examining the addendum and holding the closed-shop contract to be in effect, the Court rejected the Board’s contention that the issues involved findings of fact, deemed inapplicable cases now advanced by the Board¹⁴ and refused enforcement, stating:

“It is apropos at this point to note that the Board’s order appears to be founded upon a misinterpretation of the Act and thereby fails to effectuate its policies. Among other things the Act was designed to strengthen the Unions in their dealings with the employers. The closed-shop proviso is an example. But while the Act protects individual Union members from discriminatory discharge *it strains the imagination to see where in the Act Congress has intended that discharges made pursuant to a valid Union security contract should in themselves constitute an unfair labor practice.* It would appear that the effect

¹⁴“The cases cited by the Board, National Labor Relations Board v. Electric Vacuum Cleaner Co., supra; Wallace Corp. v. National Labor Relations Board, 323 U.S. 248; National Labor Relations Board v. Link-Belt Co., supra, admittedly are inapplicable if the discharge is pursuant to an existent closed-shop agreement untainted by any unfair labor practice.” *Aluminum Co. of America v. National Labor Relations Board*, supra, at p. 526.

of this order is that the Board is seeking to protect a recalcitrant member from his Union's discipline. The Supreme Court, we believe, anticipated this situation in *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U. S. 533, when it said:

'It (Board's judgment) should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' "

That an order of the Board must be denied enforcement if bottomed on an erroneous conclusion of law is likewise implicit in the decision in *N.L.R.B. v. Cheney Lumber Co.*, supra, wherein Justice Frankfurter, speaking for the Court, deemed the decision in the case inapplicable "if the Board has patently travelled outside the orbit of its authority so that there is, legally speaking, no order to enforce." (p. 388.)

Nor may the Board obtain any satisfaction from the cases establishing the principle that even if the parties had a closed-shop contract, employer discrimination is not permissible where it would result in a denial to employees of the fundamental freedom to select representatives and the protection against discrimination, which the Act as a whole was designed to afford. (See Petitioner's Brief, p. 32.) The case of *Wallace Corporation v. N.L.R.B.*, 323 U. S. 248 (1944), cited by the Board (p. 32), involved a discharge of an employee at the request of the Union although the employer knew that the employee was denied membership in the Union because of his activities on behalf of a rival Union. In the instant case, there is nothing other than the standard enforcement of a closed-shop

agreement. The employee had failed to retain his membership in the Union although membership in the Union was a condition of employment.

CONCLUSION.

The Board's petition in this case rests upon an erroneous construction of the written agreement between respondent and intervenors. The agreement, on its face, constitutes a closed-shop agreement, but, even if it carries any latent ambiguity, the ambiguity should be resolved in accordance with the interpretation and conduct of the parties. The Board's attempt to deny vitality to the agreement and to dismiss the parties' conduct under it in proving the proper interpretation of the agreement is, counsel believes, an unsupportable doctrine.

We submit that the logical construction of the agreement, as well as the underlying postulates for industrial peace, require the dismissal of the petition.

Dated, San Francisco, California,
November 10, 1948.

Respectfully submitted,
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